STATE OF MICHIGAN

COURT OF APPEALS

YVONNE TROST, Next Friend of MEGAN ARP, Minor,

Plaintiff-Appellee,

v

FRED MILZ,

Defendant-Appellant,

and

MICHAEL SCHUSTER and GARDEN CITY PUBLIC SCHOOLS,

Defendants.

UNPUBLISHED
September 29, 2005

No. 261715
Wayne Circuit Court
LC No. 03-321303-NO

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court order denying his motion for summary disposition on the basis of governmental immunity, MCL 691.1407(2). We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

Megan Arp, then aged twelve, was injured at her school when the chain of a playground swing detached from the seat at the S-hook connector. Defendant Fred Milz (hereinafter "defendant") was the school custodian charged with inspecting and maintaining the playground equipment. Defendant moved for summary disposition, asserting that he was immune from liability under MCL 691.1407(2) because his alleged conduct did not amount to gross negligence and was not the proximate cause of Megan's injuries. The trial court denied defendant's motion.

MCL 691.1407(2)(c) provides individual immunity for governmental employees if the employee's conduct "does not amount to gross negligence that is the proximate cause of the injury or damage." "'Gross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a).

Plaintiff bears the burden of proving that the conduct was outside the protective scope of the qualified governmental immunity provided in MCL 691.1407(2). *Mack v Detroit*, 467 Mich

186, 201; 649 NW2d 47 (2002). If reasonable jurors could honestly reach different conclusions as to whether conduct constitutes gross negligence, the issue is a factual question for the jury. *Tarlea v Crabtree*, 263 Mich App 80, 89; 687 NW2d 333 (2004). Similarly, if reasonable jurors may reach differing conclusions regarding whether a defendant's conduct was the proximate cause of the injury, then the issue should be submitted to a jury. *Id*. at 93. However, if no reasonable person could conclude that a defendant's conduct constituted gross negligence and was the proximate cause of the injury, then the trial court should grant summary disposition to that defendant. *Id*. at 83. This Court reviews de novo a trial court grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Mere evidence of ordinary negligence is inadequate to create a material question of fact concerning gross negligence. *Id.* at 122-123. In *Tarlea, supra* at 90, this Court explained that to establish gross negligence,

> [s]imply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.
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> The much less demanding standard of care--gross negligence--suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge.

In the present case, plaintiff essentially argues that defendant was grossly negligent because he should have replaced S-hooks when he discovered that they were open rather than tightening them, he should have inspected the equipment more frequently, and he failed to adequately inspect the surface below the swings to be sure there was adequate cushioning.

In denying summary disposition to defendant, the trial court focused on defendant's prior knowledge that the hooks were opening and his failure to conduct more frequent inspections or warn of the hazard.

The evidence indicated defendant was aware that S-hooks were opening up, because he typically found one or two that needed to be crimped when he conducted his monthly inspections. He also was aware of vandalism on the playground. He recognized that the purpose of checking and tightening the S-hooks was to prevent the chain from unhooking because children could get hurt if the swing fell apart. But in 2001, he was not aware of any prior incidents where a seat had detached, and in his years of experience before his deposition the situation had happened "[m]aybe one" time. Given the infrequency of this occurrence over the many years in which defendant was a custodian in charge of playground maintenance, the evidence did not show "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea, supra* at 90.

Although plaintiff maintains that defendant could have inspected the equipment more frequently and could have replaced S-hooks instead of crimping them, "saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness." *Id*. Here, defendant made monthly inspections and additional weekly inspections depending on the circumstances. He fixed open S-hooks when he discovered them. There was no evidence that defendant was aware of and disregarded safety standards that required more. Although plaintiff's expert testified that the hooks should have been replaced rather than repaired, defendant's failure to follow that course of action establishes at most ordinary negligence, not gross negligence. An objective observer watching defendant could not reasonably conclude "that the actor simply did not care about the safety or welfare of those in his charge." *Id.* Accordingly, the trial court erred in denying summary disposition for defendant.

In light of our conclusion, we need not address the question of proximate cause.

Reversed.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Pat M. Donofrio